No. 92-1440

In the Supreme Court Of the United States

OCTOBER TERM, 1992

JACQUELYNE L. NEAL,

Petitioner,

v.

WILLIAM H. BROWN, III, *et al.*,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

By her petition for a writ of certiorari, the plaintiff in this diversity case seeks to have this Court review the unanimous decision by a panel of the United States Court of Appeals for the District of Columbia Circuit (Wald, Silberman, and D. H. Ginsburg, *JJ.*) dismissing for lack of jurisdiction an appeal from an interlocutory order denying a motion to remand. We review the history of the case in

some detail because, as the court of appeals noted, "Although the disposition of this appeal is straightforward, its path to this court was not" (Pet. App. 2a).[1]

Proceeding *pro se,* petitioner Jacquelyne L. Neal commenced this action October 5, 1990 by a complaint in the Superior Court of the District of Columbia against the law firm of Schnader, Harrison, Segal & Lewis, a partnership engaged in the practice of law; three of its partners; one individual who is counsel to the firm; and one individual who formerly was an associate of the firm (A. 1-22).[2] The action involves a dispute over the legal fees the firm charged Ms. Neal in connection with its representation of her in a discrimination claim against her former employer, the United States Equal Employment Opportunity Commission.

The defendants removed Ms. Neal's action to the United States District Court for the District of Columbia as permitted by 28 U.S.C. § 1441, there being complete diversity of citizenship between the parties, the matter in controversy exceeding $50,000, and no defendant properly joined and served being a citizen of the District of Columbia (A. 45-48).[3] Ms. Neal then moved to remand. By order dated March 6, 1991, the district court denied Ms. Neal's motion to remand (Pet. App. 5a-7a).

On October 15, 1990, five days after Ms. Neal filed her District of Columbia lawsuit, the Schnader firm's individual partners started a declaratory judgment action against Ms. Neal in the United States District Court for the Eastern District of Pennsylvania (A. 23-43). Ms. Neal moved to dismiss the Pennsylvania action (A. 149) and also moved in the District of Columbia court to enjoin defendants from prosecuting the Pennsylvania action (A. 256).

The District of Columbia district court denied Ms. Neal's motion for injunction in the same March 6, 1991 order in which it denied her motion to remand (Pet. App. 5a-7a).

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1. "Pet. App." references are to the appendix to the petition for writ of certiorari.

2. "A" references are to the appendix in the court of appeals.

3. None of the individuals named in Ms. Neal's complaint was a citizen of the District of Columbia. Under the law of the District of Columbia, a partnership cannot be sued as an entity. *Day v. Avery,* 548 F.2d 1018 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 908 (1977).

By order dated March 26, 1991, the Pennsylvania district court granted Ms. Neal's motion to dismiss that action (Pet. App. 8a-13a).[4]

On March 29, 1991, Ms. Neal filed a timely notice of appeal from the District of Columbia district court's orders denying her motion to remand and denying her motion for an injunction (A. 183-84). Defendants moved immediately in the court of appeals to dismiss the appeal as moot on the injunction issue and to dismiss the appeal on the removal issue for lack of jurisdiction or, in the alternative, for summary affirmance.

A motion panel of the court of appeals granted defendants' motion to dismiss to the extent that it involved the district court's denial of Ms. Neal's motion to enjoin the Pennsylvania action because that issue was mooted by the Pennsylvania court's dismissal of the Pennsylvania action. The motion panel then referred to a merits panel the motion to dismiss the appeal to the extent that it involved the district court's denial of the motion to remand. The court appointed an amicus curiae, Professor William F. Fox, Jr., to argue the appeal on behalf of Ms. Neal and, specifically, to address whether the denial of Ms. Neal's motion to remand is reviewable before final judgment (A. 235-36).

The court of appeals heard oral argument on November 16, 1992, at which time Professor Fox, Ms. Neal, and counsel for defendants each presented argument. By opinion issued December 11, 1992, the court of appeals dismissed Ms. Neal's appeal for lack of jurisdiction. The court of appeals held that a denial of a motion to remand is not appealable under 28 U.S.C. § 1291 or under any of Ms. Neal's and amicus's other "creative" suggestions for jurisdiction (Pet. App. 3a-4a).

SUMMARY OF ARGUMENT

The petition for writ of certiorari raises no question of sufficient importance to justify review by this Court. The court of appeals' ruling involves a technical, procedural issue that has no national significance whatsoever and that

4. The Pennsylvania district court held that the claims in that action were compulsory counterclaims in the District of Columbia action.

will rarely, if ever, arise. Moreover, the court of appeals' decision is entirely consistent with the decisions of the seven other courts of appeals that have dealt with this issue. In short, not only does the petition raise no issue worthy of this Court's consideration, but also the court of appeals' decision was clearly correct.

ARGUMENT

I. THE PETITION RAISES NO QUESTIONS THAT DESERVE CONSIDERATION BY THIS COURT.

The petition for writ of certiorari raises no questions that deserve consideration by this Court. The court of appeals' opinion concerned only the issue of the appealability of a denial of a motion to remand, hardly an issue of sufficient importance to merit this Court's attention. Moreover, the peculiar factual convergence that occurred in this case of an order denying a motion to remand coupled with an order denying a motion for an injunction that became moot before the appeal was taken will rarely, if ever, arise. In short, there exist no special or important reasons to grant the writ, and this Court should deny it.

II. THE DECISION WAS CLEARLY CORRECT AND IS IN ACCORD WITH THE DECISIONS OF THE SEVEN OTHER COURTS OF APPEALS THAT HAVE CONSIDERED THE QUESTION

This Court should deny the petition for a writ of certiorari for the additional reason that the court of appeals' decision is clearly correct and wholly consistent with the decisions of every court of appeals to have considered the issue. Specifically, as the court of appeals here noted, *every* court of appeals to have considered the issue (seven in all) has held that the denial of a motion to remand is not appealable. *See, e.g., Estate of Bishop v. Bechtel Power Corp.*, 905 F.2d 1272 (9th Cir. 1990); *Rohrer, Hibler & Replogle, Inc. v. Perkins*, 728 F.2d 860 (7th Cir.), *cert. denied*, 469 U.S. 890 (1984); *Poirrier v. Nicklos Drilling Co.*, 648 F.2d 1063 (5th Cir. 1981); *Three J Farms v. Alton Box Board Co.*,

609 F.2d 112 (4th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980); *Aberle Hosiery Co. v. American Arbitration Ass'n*, 461 F.2d 1005 (3d Cir. 1972); *Brough v. United Steelworkers of America*, 437 F.2d 748 (1st Cir. 1971); *Wilkins v. American Export-Isbrandtsen Lines, Inc.*, 401 F.2d 151 (2d Cir. 1968).

Ms. Neal argues that her 28 U.S.C. § 1292 appeal from the denial of an injunction gave the court of appeals jurisdiction to review the order denying remand. But the courts of appeals have held that 28 U.S.C. § 1292 is inapplicable where the injunction order that would form the basis for appellate jurisdiction is moot at the time the appeal is taken. *See, e.g., Rodriguez v. Handy*, 802 F.2d 817, 821 (5th Cir. 1986); *Robert Stigwood Group Ltd. v. Hurwitz*, 462 F.2d 910, 914 & n.7 (2d Cir. 1972); *see also Marilyn T., Inc. v. Evans*, 803 F.2d 1383, 1385 & n.5 (5th Cir. 1986); *H. K. Porter Co. v. Metropolitan Dade County*, 650 F.2d 778, 782 (5th Cir. 1981); *Brown v. New Orleans Clerks & Checkers Union*, 590 F.2d 161, 165 (5th Cir. 1979). Thus, the court of appeals' dismissal of the appeal was in complete accordance with well-settled law and was entirely correct.[5]

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5. In her petition for a writ of certiorari, Ms. Neal alludes to some alleged impropriety in the court of appeals' appointment of an amicus curiae. This hardly is an issue that would justify review by this Court. The court of appeals' appointment of amicus was entirely proper and clearly was intended only to benefit Ms. Neal. In any event, Ms. Neal submitted her own brief in the court of appeals and participated in the oral argument herself. The amicus acted merely as a friend of the court and in no way infringed upon Ms. Neal's right to proceed *pro se*.

CONCLUSION

For all of the foregoing reasons, this Court should deny Ms. Neal's petition for writ of certiorari.

Respectfully submitted,

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